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In The

Supreme Court of the United States

October Term, 1984

MARGARITA CIRO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether under the reasoning of *Davis v. Alaska,* 415 U.S. 308 (1974) (Burger, C.J.), the petitioner was deprived of her sixth amendment right of confrontation by the district court's ruling that barred her from impeaching the crucial accomplice witness for the prosecution by evidence of his recent juvenile adjudication for kidnapping and assault with intent to commit rape and robbery.

2. Whether the district court abused its discretion under Fed. R. Evid. 609(d) by disallowing use by the defense of that juvenile adjudication to impeach where conviction of such grave felony offenses would be automatically admissible against an adult prosecution witness under Fed. R. Evid. 609(a), where no competing societal interest was present or even claimed below, and where the ultimate issue of petitioner's guilt or innocence turned on the jury's assessment of the credibility of the indispensable accomplice witness thus shielded from effective impeachment.

PARTIES BELOW

The following were the parties to the proceedings before the court of appeals whose judgment is sought to be reviewed: petitioner, Margarita Ciro; Fanny Lidia Sloan, the other appellant below; and the United States of America, the appellee below.

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No. 84-

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MARGARITA CIRO,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINION BELOW

The slip opinion of the court of appeals, not yet reported, *United States v. Ciro,* No. 84-1298, slip op. at 1441-45 (2d Cir. Jan. 21, 1985) (per curiam), appears in the appendix (App. 1a-5a).

JURISDICTION

The judgment of the court of appeals was entered on January 21, 1985. A motion for stay of the mandate and continued release

on bail pending application for certiorari was granted on February 8, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND RULE OF EVIDENCE INVOLVED

The sixth amendment to the Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend. VI. The full text of the constitutional provision is set forth in the appendix (App. 6a).

Rule 609(a) of the Federal Rule of Evidence provides:

> (a) *General rule.* For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

Rule 609(d) of the Federal Rules of Evidence provides:

> (d) *Juvenile adjudications.* Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the

> offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

The full text of Fed. R. Evid. 609 is also set forth in the appendix (App. 6a-8a).

STATEMENT OF THE CASE

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner, Margarita Ciro, was convicted on one count of conspiring to distribute cocaine, in violation of 21 U.S.C. § 846, and one count of possessing cocaine with the intent to distribute it, in violation of 21 U.S.C. § 841(a)(1), 18 U.S.C. § 2.[1] The district court sentenced petitioner, a first offender, to concurrent five-year terms of imprisonments on the respective conspiracy and substantive counts of the indictment, and imposed a special parole term of ten years. The court of appeals affirmed the conviction on both counts.

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1. Four other defendants were named in the two-count indictment in this case. After plea bargaining, the lead defendant, Juan Carlos Caicedo, pleaded guilty before trial to the single substantive charge; the conspiracy count against him was eventually dismissed in exchange for his cooperation with the government. In addition, the government agreed not to prosecute Caicedo for his admitted commission of numerous prior cocaine trafficking offenses beyond the scope of the indictment. Caicedo testified as the crucial prosecution witness at the trial. He later received a suspended sentence, and was placed on probation for a period of five years, to be followed by special parole for life. Another co-defendant, Martha Fernandez, pleaded guilty to the entire indictment at the start of the suppression hearing. The three remaining defendants, petitioner, Fanny Lidia Sloan, and George Gordillo, were tried together in the ensuing five-day trial. Sloan, like the petitioner, was convicted on both counts; Gordillo was acquitted of all charges.

1. The Trial

On the evening of March 28, 1984, the petitioner, along with four other suspects, was arrested in Queens County, New York City, by police officers assigned to the Drug Enforcement Task Force. Both the conspiracy and substantive drug offenses for which the five defendants were later indicted arose out of a series of events that had occurred over a four-hour period immediately before their arrests (T329-30).[2] To relate those events in its case-in-chief, the government called four witnesses to the stand: Juan Carlos Caicedo, a teenage drug dealer and co-defendant turned accomplice witness, who was cooperating with the government under a plea agreement; Detective George Annarella, the undercover policeman who had posed as a drug buyer; and two surveillance officers, State Trooper Lawrence McDonald and Police Officer Martin O'Driscoll. None of the defendants testified or produced any witnesses.

a. Testimony of the Police

In his undercover role, Detective Annarella first met the dealer, Caicedo, on the afternoon of March 28th. They began at once to negotiate for the officer's purchase from Caicedo of a kilogram of cocaine (T283-86). During the next few hours, Caicedo and the undercover officer met three more times in the vicinity of Park City Estates, a large apartment complex in Queens County. In each instance, Caicedo stalled, telling his putative buyer that the cocaine was not yet available (T286-92). At the third such meeting, Caicedo was accompanied by the defendant Fanny Lidia Sloan, who urged the officer to be patient, for the "lady bringing cocaine had car trouble, but she would be arriving shortly . . . in a white car" (T290).

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2. Numbers in parentheses preceded by "T" refer to pages of the trial transcript.

After another unsuccessful meeting with Caicedo at about 6:00 p.m., his fourth, the undercover officer quit for the night and drove off towards his base. While en route, he received a relayed message from Caicedo, who told him that the cocaine had arrived and could be purchased for $50,000 (T292-95).

At 7:00 p.m., the detective returned for the fifth time that day to Park City Estates. He was met in his car by Caicedo and a different defendant, Martha Fernandez, who was carrying a blue-purple handbag containing a kilogram of cocaine (T296). Moments later, both Caicedo and Fernandez were arrested in the car (T296-98).

After those arrests, the detective and the police surveillance team proceeded straightaway to an upper-floor apartment in the building complex — the residence of Martha Fernandez — where, as Caicedo had just informed them, they could find defendant Sloan. Having already begun his cooperation with the government, and pretending that he had not been arrested, Caicedo went up to the apartment with the police (T261, 299-300, 319-21, 390, 418-19). There they encountered Sloan, who answered the undercover officer's knock on the door. She was immediately placed under arrest, and the officers then searched the premises (T301).

In the bedroom, they discovered petitioner sitting on the bed. She, too, was arrested (T301, 419). No drugs were found in her possession, and she made no statements to the arresting officers. As the police prepared to leave the apartment, defendant George Gordillo arrived at the door and was arrested on the spot (T310, 354-55, 421).

For their part, the surveillance officers testified at trial that they had observed the undercover detective's sequence of meetings with Caicedo, Sloan, and Fernandez before the arrests took place. Trooper McDonald related that, after the intended drug

transaction was aborted for the fourth time that afternoon, he and his partner "broke off surveillance" at about 6:15 p.m. and drove away from their lookout in Park City Estates (T455). For five minutes before departing, however, they watched various cars enter the oval driveway in front of the apartment complex. According to Trooper McDonald, petitioner arrived in that interval as a passenger in a light tan car (with a red roof) driven by the defendant Gordillo (T412-13, 442-43).

The surveillance officer observed petitioner, whom he had never seen before, for about three or four seconds while "she was carrying a bluish gray or multi-colored shopping bag" (T413, 446-47). He went on to state, nonetheless, that the handbag seized later that night from Martha Fernandez incident to her arrest appeared to be the same bag he had glimpsed petitioner carry into the lobby of the building (T414).

Trooper McDonald testified that he did not see petitioner again until nearly an hour later, when he and Detective Annarella came upon her in the apartment bedroom following the arrests of Caicedo, Fernandez, and Sloan. His identification of her impelled the other officer to take petitioner into custody (T419, 452).

Nowhere in the trial testimony of the three police officers does it appear that petitioner participated in any meetings or telephone calls with the undercover detective — in fact, he had not seen her prior to arresting her; nor, for that matter, was there any evidence adduced by them that she negotiated for the sale of the cocaine, delivered it to the detective, or even accompanied or communicated with any other defendant who did.

In sum, all the crucial, albeit substantially uncorroborated, evidence directly implicating petitioner was furnished by the principal witness for the prosecution, the cooperating defendant Juan Carlos Caicedo. His credibility was central to the outcome of the trial.

b. Testimony of Caicedo

At the outset of his testimony, the 19-year-old Caicedo acknowledged that he was awaiting sentence on his guilty plea to one count of the indictment, and that he was testifying under an agreement with the government "cover[ing] all [his other] narcotics dealings" he had previously disclosed to the prosecution (T88-90, 231). He conceded that the police had advised him that he was a possible candidate for lenient treatment under the sentencing provisions of the federal Youth Corrections Act (T232-33). He admitted selling cocaine "three or four days . . . a week" from November, 1983 up to his arrest in late March, 1984 (T90). Having experimented with cocaine four years earlier at the age of fifteen, he became a "regular user" of the drug when he started dealing cocaine the year before his arrest. His drug habit by then consisted of ingesting or "free-basing" cocaine "almost every day" (T91, 170-72).

Caicedo next supplied the jury with the details of his arrangement with the undercover officer on March 28th for the sale of a kilogram of cocaine (T103-15). He stated that he returned to the apartment of defendant Fernandez after his fourth inconclusive meeting with Detective Annarella, where he was soon joined by four other people: the defendants Fernandez, Sloan, Gordillo, and petitioner (T115-17).

Caicedo claimed that when he first saw the petitioner in the apartment she was holding a blue-purple handbag, which she eventually carried into the bedroom. There, at his request, she removed a package inside it containing cocaine and displayed it to the assembled defendants (T119, 122-23). Before notifying his customer that the drug had arrived, he reportedly heard petitioner remark that the cocaine "was coming direct from Bogota" (T127).

Leaving Sloan and petitioner at the apartment, Caicedo and Fernandez later went downstairs to sell the cocaine to the

undercover officer. Caicedo testified that Fernandez carried the drug package in the handbag she had borrowed from petitioner (T128-29). Had he not been arrested, Caicedo said, his commission on the sale would have been $2,000, with the balance of the purchase price, $48,000, to be retained by Fernandez (T131).

c. The Evidence Excluded on the Government's Motion

Only moments before the jury heard the opening statements of counsel, the government appealed to the trial court to bar the defense from impeaching Caicedo, the chief prosecution witness, with evidence of his prior juvenile adjudication (T21).

The government initially informed the lower court that Caicedo, who was 19 years of age at the time of the instant trial (T88), had been arrested in California three years earlier: "The charges against him were kidnapping and assault with intent to rape and with intent to rob. The petition was sustained" (T22). When pressed by the trial judge to offer more background information, the prosecutor next responded that, although the state records were sealed, a delinquency petition had been sustained against Caicedo in 1981 after a juvenile proceeding in which the the kidnap victim had testified, and Caicedo had then been committed to a juvenile detention facility where he served more than a year (T61-62).

Following a brief recess, the government returned to advise the district court of further details concerning the prior juvenile adjudication of its main witness:

> Mr. Caicedo is apparently in a bar in California with a couple of other people, one of whom was related to him. They were drinking. They met an older woman, a woman who was apparently in her 30's. He was 16. There was some discussion at which point they went somewhere to a room.

> I guess [the] three gentlemen — I use the word loosely — attempted to take certain liberties. The woman said, no, I didn't have that in mind. She went to get out of the room. Somebody blocked the door. There may have been some touching. She went out of the room. Pressed charges. And that resulted in this particular incident that we are now talking about.
>
> He was 16 at the time, your Honor.
>
> Mr. Caicedo maintains, for what it is worth, that he took the rap for somebody who could have been tried as an adult [T78].

The trial court's ruling followed shortly: Over the vigorous objection of defense counsel, the government's application *in limine* was granted, and the prior juvenile adjudication was categorically excluded as impeachment evidence against Caicedo (T84). No explicit findings were made under the two-pronged test of Fed. R. Evid. 609(d) governing the admissibility of a delinquency record to impeach; the basis of the ruling was left unstated; and defense counsel's rudimentary request for a hearing to "get more of the material facts" (T69) went unheeded.

2. The Decision on Appeal

On appeal to the Second Circuit following the judgment of conviction, petitioner claimed, *first,* that in view of the holding of this Court in *Davis v. Alaska,* 415 U.S. 308, 318 (1974), the district court erred in refusing to allow her to impeach the key prosecution witness by eliciting evidence of his recent juvenile adjudication for kidnapping a woman and assaulting the victim with the intent to rape and rob her, thereby denying petitioner her constitutional right of effective cross-examination secured by

the confrontation clause of the sixth amendment; and, *second,* that the exclusion of such core impeachment evidence against the indispensable government witness constituted a plain abuse of discretion under Fed. R. Evid. 609(d).

The court of appeals disagreed; it held that the challenged ruling was not improper. Regarding petitioner's first claim, it chose to distinguish *Davis* on two grounds: First, the prosecution witness in this case, unlike the one in *Davis,* was not on probation, and thus lacked the same motive to lie; and, second, the exclusion of the juvenile record in *Davis* precluded the defense from properly developing the issue of bias, whereas here, the court asserted, "the defense had ample evidence, absent the juvenile adjudication, with which to impeach the witness' credibility in general and bias in particular." *Ciro,* slip op. at 1442-43 (App. 3a).

The Second Circuit likewise upheld the district court's exercise of discretion under Fed. R. Evid. 609(d). "We cannot say," the court of appeals concluded, "that the judge erred in finding that the excluded evidence was not 'necessary for a fair determination of the issue of guilt or innocence.' " *Id.* at 1443 (App. 4a).

The discussion closed on an admonitory note. The court questioned whether the government should have pressed the objection at all, for "the exclusion of the evidence provided [petitioner] with a serious issue for appeal." *Id.* at 1444 (App. 4a).

REASONS FOR GRANTING THE WRIT

This case raises two substantial, correlative questions of federal law left unsettled by the opinion of Chief Justice Burger a decade ago in the landmark decision of *Davis v. Alaska,* 415 U.S. 308, 318 (1974) (state conviction reversed for denial of "right of effective cross-examination" guaranteed by the confrontation clause of the sixth amendment).

First, it subserves this Court's function on certiorari to expound and stabilize the constitutional principles earlier set forth in *Davis,* for it seeks the needed resolution of the important issue whether the sixth amendment confers a right in these circumstances to expose fully the bias and motives to falsify of the government's main witness against an accused, and generally to discredit that key teenage witness, through essential cross-examination about his recent juvenile adjudication for kidnapping and assault with intent to rape and rob. Further, insofar as the court of appeals decided to uphold a material restriction of petitioner's asserted right to confront her principal accuser with such impeachment evidence — a restriction petitioner challenges as unwarranted and prejudicial — its decision conflicts with the *Davis* rule. That conflict alone merits review of the Second Circuit's judgment.

Second, the present case fairly involves the scope, construction, and application of a federal rule of evidence, matters not before the Court in *Davis.* The administration of criminal justice in the federal courts would be enhanced by this Court's definitive construction of Rule 609(d) of the Federal Rules of Evidence in the context of this case, for it will affect the future bounds of defense inquiry into the prior juvenile adjudications of critical prosecution witnesses. Review by this Court will also clarify the applicable, but unobserved, policy considerations expressed in the Notes of the Advisory Committee, which in this setting call for the overriding of the convention of exclusion of juvenile records in the interests of particular justice. Otherwise, the decision of the court of appeals on the significant federal evidentiary question posed here will stand in derogation of the plain language, legislative history, and public policy of Rule 609(d).

1. The Confrontation Clause Question

In view of the reasoning of *Davis,* the petitioner was deprived of her sixth amendment right of confrontation by the district court's ruling that barred her from impeaching Caicedo, the crucial

accomplice witness for the prosecution, by evidence of his recent juvenile adjudication for kidnapping and assault with intent to commit rape and robbery.

As a defendant in a criminal case, petitioner was constitutionally entitled to confront each of the witnesses against her. U.S. Const. amend. VI. Her right of confrontation was violated once the trial court, at the instance of the prosecution, cut off *in limine* all inquiry on the previous juvenile record of the prosecution's own star witness.

This Court has time and again emphasized that a primary interest secured by the confrontation clause of the sixth amendment is the right of *effective* cross-examination. *Davis,* 415 U.S. at 318; *see generally Watkins v. Sowders,* 449 U.S. 341, 349 & n.4 (1981); *Smith v. Illinois,* 390 U.S. 129, 132-33 (1968); *Douglas v. Alabama,* 380 U.S. 415, 418 (1965); *Alford v. United States,* 282 U.S. 687, 694 (1931).

Writing for the majority in *Davis,* Chief Justice Burger stated:

> Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, *i.e.,* discredit, the witness. One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness. By so doing the cross-examiner intends to afford the jury a basis to infer that the witness' character is such that he would

> be less likely than the average trustworthy citizen to be truthful in his testimony.

415 U.S. at 316.

In *Davis,* the Court reversed defendant's conviction on sixth amendment grounds due to the trial court's refusal to allow the defendant to cross-examine the key prosecution witness regarding the latter's probation status under a juvenile court adjudication, notwithstanding state legislative policy protecting the anonymity of juvenile offenders. In the Court's view, "defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." *Id.* at 318.

In the instant case, Caicedo was the chief witness against the petitioner. His credibility as the lone testifying accomplice was crucial to the government's case. "Where the witness the accused seeks to cross-examine is the 'star' government witness, providing an essential link in the prosecution's case, the importance of full cross-examination to disclose possible bias is necessarily increased." *United States v. Summers,* 598 F.2d 450, 460 (5th Cir. 1979); *accord Greene v. Wainwright,* 634 F.2d 272, 275 (5th Cir. 1981).

As expressly recognized by this Court, "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Davis,* 415 U.S. at 316-17; *accord Greene v. McElroy,* 360 U.S. 474, 496 (1959). The "possible biases, prejudices, or ulterior motives" of Caicedo, therefore, should have been subject to the broadest exploration at trial, for those facets of impeachment are " 'always relevant as discrediting the witness and affecting the weight of his testimony.' " *Davis,* 415 U.S. at 316 (citation omitted). Here, however, at the government's instance, the ruling

in limine prohibited effective exploratory inquiry by defense counsel into the full range of Caicedo's bias and motives to falsify.

The introduction of the relevant evidence of Caicedo's past juvenile adjudication was compelled by the sixth amendment so as to permit a meaningful, particularized attack on the accomplice witness' credibility. For example, Caicedo may well have been biased in his own favor (and correlatively prejudiced towards the petitioner) in order to enhance his prospects for avoiding an additional loss of freedom so soon after his release from lengthy confinement in state custody on profoundly serious juvenile charges. Moreover, the prosecutor's cryptic remark to the trial judge that Caicedo claimed "he took the rap for somebody who could have been tried as an adult" (T78) suggests at least that the now hardened witness had a strong motive this time to deflect blame away from himself and ascribe it to others. From another perspective, Caicedo's self-serving effort to excuse his former adjudication as merely "[taking] the rap" for an adult confederate reflected squarely on his veracity. Full cross-examination to probe those subjects should have been afforded the defense.

As was true in the cognate context of *Davis*, the "accuracy and truthfulness" of Caicedo's testimony were "key elements" in the government's case against petitioner, since that testimony surely provided the " 'crucial link in the proof.' " 415 U.S. at 317. When the prosecution hinges on the credibility of an indispensable accomplice witness like Caicedo, "wide latitude in cross-examination is especially appropriate." *Burr v. Sullivan*, 618 F.2d 583, 587 (9th Cir. 1980).

Though the scope of cross-examination rests within the sound discretion of the trial judge, this Court has provided dispositive guidance for the exercise of such judicial discretion:

> The extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court. It may exercise a reasonable judgment in determining when the subject is exhausted. But no obligation is imposed on the court, such as that suggested below, to protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitutional protection from self-incrimination, properly invoked. There is a duty to protect him from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him. But no such case is presented here. The trial court cut off *in limine* all inquiry on a subject with respect to which the defense was entitled to a reasonable cross-examination. This was an abuse of discretion and prejudicial error.

Alford, 282 U.S. at 694 (citations omitted). *See Davis*, 415 U.S. at 318 n. 6 ("the constitutional dimension of our holding in *Alford* is not in doubt"); *see also Smith v. Illinois*, 390 U.S. at 132-33 (1968) (relying on *Alford* rule). The discretionary authority of the trial court, of course, becomes operative only *after* " 'there has been permitted as a matter of right sufficient cross-examination to satisfy the Sixth Amendment.' " *Greene v. Wainwright*, 634 F.2d at 275 (citations omitted); *see also United States v. Tracey*, 675 F.2d 433, 437 (1st Cir. 1982).

Any "denial or significant diminution" of the right to confront and cross-examine, as in this case, "calls into question the ultimate 'integrity of the fact-finding process' and requires that the competing interest be closely examined." *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973). Yet, nowhere in the record of these proceedings, either at trial or on appeal, did the

government ever articulate a competing legitimate interest sufficient to outweigh petitioner's right of confrontation. There was none.

Even if the implicit premise of the government's motion *in limine* was to ensure the confidentiality of a delinquent's sealed record, it is unavailing in the context of this case, since here "the right of confrontation is paramount to the State's policy of protecting a juvenile offender." *Davis*, 415 U.S. at 319. The opinion of the Chief Justice in *Davis* rejected the state's position that its policy interest in maintaining the confidentiality of a delinquent's record outweighed any competing interest the accused might have in fully cross-examining an adverse witness. As in *Davis*, the government could have protected Caicedo from exposure of his juvenile adjudication in these circumstances by refraining from using him to establish its case. The prosecution cannot, consistent with the right of confrontation, demand that petitioner bear the full burden of vindicating the qualifiable societal interest in the secrecy of juvenile criminal records. 415 U.S. at 320.

The *Davis* decision underscores petitioner's position that "[t]he need for relevant evidence to resolve the credibility issue in a particular case may be more pressing than the judicial system's interest in the rehabilitation of juveniles." 3 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 609[09], at 609-100 (1982). Furthermore, in the light of Caicedo's substantial drug trafficking and related pattern of continuing criminal conduct following his release by state juvenile authorities, the exclusion of his juvenile adjudication could not give effect to the creditable policy ends of the juvenile justice system respecting the confidentiality of juvenile records. This was hardly a case of a reformed juvenile offender needing protection from disclosure of some past indiscretion. The commentators have long recognized that "[a]t times, however, the rehabilitative process may be a demonstrated failure as regards a particular witness on whose credibility the resolution of the contested issues turns." *Id.* at 609-99; *see* Notes

of Advisory Committee on Fed. R. Evid. 609(d). Thus, the strategic role assumed by Caicedo as the government's main witness, coupled with his extensive criminal recidivism, should have deprived him of the otherwise available shield of enlightened juvenile justice policy.

As a matter of constitutional law and sound public policy, petitioner should not have been required to yield her vital sixth amendment right to impeach Caicedo's credibility by disclosing his prior juvenile record for kidnapping and felonious assault. Like the defendant in *Davis*, she "was thus denied the right of effective cross-examination which 'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.' " 415 U.S. at 318 (citations omitted).

2. Admissibility Under Rule 609(d)

The policy implications of petitioner's challenge to the constitutionality of the exclusionary ruling of the trial judge inform her allied claim regarding the district court's flawed exercise of its discretion under Fed. R. Evid. 609(d).

Though Rule 609(d) embodies the prevailing view that evidence of juvenile adjudications is generally not usable for impeachment, the principle of exclusion is not absolute. In a criminal case, the rule prescribes a two-part test for the discretionary admission of a juvenile adjudication against a witness other than the accused: *first*, " if conviction of the offense would be admissible to attack the credibility of an adult," and, *second*, "the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence." Fed. R. Evid. 609(d). Under the circumstances of this criminal case, the damaging impeachment evidence of the principal prosecution witness' prior juvenile adjudication met each of the conjunctive elements of admissibility laid down by the rule.

The first step of the analysis incorporates the general rule of evidence in the federal courts with respect to impeachment by evidence of conviction of crime. The standards for the admission of that evidence are specified in subdivision (a) of Rule 609, which provides in pertinent part that "[f]or the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime *shall be admitted* if [properly introduced] during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year . . ., and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect *to the defendant* . . . ." Fed. R. Evid. 609(a) (emphasis added). Hence, all crimes of felony grade, without regard to the nature of the particular offenses, are allowed to be used for impeachment, subject only to a weighing process that balances the risk of unfair prejudice to the accused against the probative value of the evidence of the crime.

In the present case, the underlying offenses for which Caicedo was adjudicated a delinquent, had they been committed by an adult, would have constituted major felonies under the relevant California statutes: kidnapping in that state is punishable by imprisonment for up to seven years, Cal. Penal Code § 208 (West 1970 & Supp. 1984); kidnapping to commit robbery warrants life imprisonment, *id.* § 209; and assault with intent to rape entails a prison sentence not to exceed six years. *Id.* § 220.

Guided by Rule 609(a), the circuit courts have uniformly held that all such felony convictions are automatically usable to impeach a prosecution witness. *Government of the Virgin Islands v. Carino,* 631 F.2d 226, 228-30 (3d Cir. 1980); *United States v. Nevitt,* 563 F.2d 406, 408-09 (9th Cir. 1977), *cert. denied,* 444 U.S. 847 (1979); *United States v. Martin,* 562 F.2d 673, 680-81 n. 16 (D.C. Cir. 1977); *United States v. Ortega,* 561 F.2d 803, 806 (9th Cir. 1977); *United States v. Smith,* 551 F.2d 348, 359 & n. 21 (D.C. Cir. 1976).

The unbroken line of decisions on this issue draws its support from two authoritative sources: the plain language of Rule 609(a) itself, and the clear expression of legislative intent found in the history of the provision's enactment.

On its face, Rule 609(a) divests the district court of the discretion to weigh the probative value of a government witness' prior felony conviction against its prejudicial effect on the witness himself or the prosecution's case. *See, e.g., Nevitt,* 563 F.2d at 408-09. As the Ninth Circuit concluded, subdivision (a) of the rule "does not permit any weighing process with respect to such impeaching evidence elicited by a defendant. The evidence produced in his defense cannot have a prejudicial effect 'to the defendant.' " *Ortega,* 561 F.2d at 806. *See generally* E. Cleary, *McCormick on Evidence* § 43, at 94-96 (3d ed. 1984); Note, *Impeachment by Prior Conviction: Adjusting to Federal Rule of Evidence 609,* 64 Cornell L. Rev. 416, 423 & n. 43 (1979); Comment, *Prior Conviction Evic'ence and Defendant Witnesses,* 53 N.Y.U. L. Rev. 1290, 1299-1300 & n. 62 (1978).

The legislative history, in addition, confirms that "[p]rejudice to the [prosecution] witness stemming from revelation of his past was rejected by Congress as a factor to be considered by the courts." 3 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 609[06] at 609-89 (1982). As explained by Representative Hungate, the leading Conference Committee manager for the federal rules of evidence: "[Rule 609(a)], in practical effect, means that in a criminal case the prior felony conviction of a prosecution witness may always be used. There can be no prejudicial effect to the defendant if he, the defendant, impeaches the credibility of a prosecution witness." 120 Cong. Rec. 40,891 (1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 7098, 7111. *See United States v. Lipscomb,* 702 F.2d 1049, 1058 & n. 37 (D.C. Cir. 1983) (en banc). The Conference Committee Report strongly supports that straightforward interpretation of the rule's language:

> The danger of prejudice to a witness other than the defendant (such as injury to the witness' reputation in his community) was considered and rejected by the Conference as an element to be weighed in determining admissibility. It was the judgment of the Conference that the danger of prejudice to a nondefendant witness is outweighed by the need for a trier of fact to have as much relevant evidence on the issue of credibility as possible. Such evidence should *only* be excluded where it presents a danger of improperly influencing the outcome of the trial by persuading the trier of fact to convict the defendant on the basis of his prior criminal record.

H.R. Conf. Rep. No. 1597, 93d Cong., 2d Sess. 9-10 (1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 7098, 7103 (emphasis added).

Caicedo's "conviction" of the felony offenses subsumed by his juvenile offender status, therefore, "would be admissible to attack the credibility of an adult," Fed. R. Evid. 609(d), namely, a prosecution witness like Caicedo himself, in full satisfaction of the first part of the applicable Rule 609(d) test for the admission of evidence of a juvenile adjudication.

The record here likewise fulfills the second element of the test, because the admission in evidence of the juvenile adjudication was "necessary for a fair determination of the issue of guilt or innocence." Fed. R. Evid. 609(d).

Given the paucity of evidence against petitioner in the police officers' testimony, the government's case turned on the credibility of the accomplice witness. Defense counsel should have been afforded the maximum opportunity to assail the reliability of

Caicedo's testimony. Despite the presence of other impeaching material available to the jury, Caicedo's prior juvenile adjudication — tantamount to conviction on heinous felony charges, had it been known to the jury, could have yielded a compelling impact on his credibility as to the unsubstantiated aspects of his testimony. As this Court has stated, in terms that exactly track the second component of the Rule 609(d) standard at issue here: "The jury's estimate of the truthfulness and reliability of a given witness *may well be determinative of guilt or innocence,* and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." *Napue v. Illinois,* 360 U.S. 264, 269 (1959) (emphasis added); *see Greene v. Wainwright,* 634 F.2d at 275-77.

In short, a fair determination of the guilt or innocence of petitioner was necessarily dependent on the trial court's allowance of a meaningful opportunity for her to discredit Caicedo by confronting him with his juvenile record for grave felonies. That she was denied. By narrowing the scope of her cross-examination under a misinterpretation of Rule 609(d), the district court severely prejudiced her defense in this close case. *See Davis,* 415 U.S. at 318.

Thus, the excluded impeachment evidence in this case lies entirely within the ambit of the two-part exceptive provision of Rule 609(d), and it should have heen admitted thereunder on cross-examination of the accomplice witness. Had Caicedo been convicted as an adult of the same felony offenses for which he was adjudicated a delinquent, that impeachment evidence would have been automatically admissible against him precisely because he testified as a prosecution witness. *See* Fed. R. Evid. 609(a). Only his status as a juvenile offender unreasonably protected him from disclosure of that evidence to the triers of fact. There was no reason in law or public policy for that benefit to have been conferred on Caicedo, nor for that limitation to have been imposed

on petitioner's cross-examination. It was neither required by Rule 609(d) nor deserved by the government witness.

By its very terms, Rule 609(d) recognizes discretion in the trial judge to effect an accommodation among its various policy concerns by departing from the general rule of exclusion of juvenile records. What should have informed the lower court's exercise of that discretion was the gloss provided by the Notes of the Advisory Committee regarding Rule 609(d): "Admittedly, however, the rehabilitative process may in a given case be a demonstrated failure or the strategic importance of a given witness may be so great as to require the overriding of general policy [exclusion of juvenile adjudications] in the interests of particular justice." Notes of Advisory Committee on Fed. R. Evid. 609(d). *See* 3 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 609[09], at 609-99 (1982).

Both of those factors were present here. Caicedo's own drug conviction in the case on trial, together with his persistent earlier criminal behavior, plainly demonstrated the failure of the rehabilitative process in this instance. Moreover, his "strategic importance" as the chief witness for the prosecution was beyond dispute. In the face of those considerations, the government could not, indeed it did not, claim that the general societal interest in protecting the anonymity of juvenile offenders outweighed the particular countervailing interest of the petitioner in impeaching the crucial accomplice witness. *See Davis,* 415 U.S. at 319.

Under the true public policy embraced by Rule 609(d), and in the interests of particular justice, Caicedo's juvenile adjudication should have been usable by petitioner for impeachment of her principal accuser in this criminal case. The trial court's improper exclusion of that evidence under Rule 609(d) was an abuse of discretion and prejudicial error.

CONCLUSION

A writ of certiorari should issue to review the judgment of the court of appeals.

Respectfully submitted,

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APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 579, 666 — August Term, 1984

(Argued: January 15, 1985 Decided: January 21, 1985)

Docket Nos. 84-1298, 84-1312

UNITED STATES OF AMERICA,

Appellee,

-against-

MARGARITA CIRO and FANNY LIDIA SLOAN,

Appellants.

Before:

FEINBERG, *Chief Judge,* LUMBARD and KAUFMAN, *Circuit Judges.*

Appeals from judgments of conviction in the United States District Court for the Eastern District of New York.

Affirmed on all counts.

Opinion

RICHARD F. GUAY, New York, NY (Montclare & Guay, Paul D. Montclare, of Counsel), *for Appellant Margarita Ciro.*

RAPHAEL F. SCOTTO, Brooklyn, NY, *for Appellant Fanny Lidia Sloan.*

JOHN J. GALLAGHER, Brooklyn, NY, Assistant United States Attorney for the Eastern District of New York (Raymond J. Dearie, United States Attorney for the Eastern District of New York, Mary McGowan Davis, Assistant United States Attorney, of Counsel), *for Appellee.*

PER CURIAM:

Margarita Ciro and Fanny Lidia Sloan appeal from judgments of conviction in the United States District Court for the Eastern District of New York, Leonard D. Wexler, J., entered after a jury trial. They were each found guilty of one count of conspiring to distribute cocaine, 21 U.S.C. §846, and of one count of possessing cocaine with an intent to distribute, 21 U.S.C. §841(a)(1), 18 U.S.C. §2. We affirm on all counts.

The prosecution presented four witnesses during the five-day trial: three government agents and Juan Caicedo, a participant in the scheme who subsequently entered into a cooperation agreement with the government. Judge Wexler, on the

prosecution's motion, excluded evidence of a juvenile adjudication (involving kidnapping and assault with intent to rape) entered a few years earlier against Caicedo. Relying on *Davis v. Alaska*, 415 U.S. 308 (1974), appellants contend that this exclusion violated their Sixth Amendment right to confrontation. We disagree. *Davis* is distinguishable on at least two grounds. First, in *Davis* the witness was on probation for his juvenile adjudication at the time of the events at issue, and fear of jeopardizing his probationary status arguably furnished a strong motive to lie. *Id.* at 311. The witness here was not on probation and therefore did not have the same motivation to lie. Second, in *Davis* the exclusion left the defense without any substantial evidence with which "to develop the issue of bias properly to the jury." *Id.* at 318. Here, by contrast, the defense had ample evidence, absent the juvenile adjudication, with which to impeach the witness' credibility in general and bias in particular. In response to questions put to him on cross-examination, Caicedo admitted that he "free based" cocaine some four times a week and that free basing diminished his ability to recall. He acknowledged that as a result of his agreement with the government he would not be prosecuted for "60, 70 or 80 other deals" in which he had been involved. He was told that because of his cooperation with the government there "might be a possibility" that he would receive a lesser sentence or a sentence under the Youth Corrections Act. And he emphasized that he "didn't know what is going to happen to these [defendants]. And to tell you the truth, I don't care." In short, appellants' ability to cross-examine Caicedo effectively was not substantially impeded by the exclusion of the evidence in question.

Appellants also contend that the district court should have admitted evidence of Caicedo's juvenile adjudication pursuant to Fed. R. Evid. 609(d). The exclusion of the witness' juvenile

adjudication did not constitute an abuse of discretion. *United States v. Lind,* 542 F.2d 598, 599 (2d Cir. 1976). In light of the ample opportunity for effective cross-examination discussed above, we cannot say that the judge erred in finding that the excluded evidence was not "necessary for a fair determination of the issue of guilt or innocence." Fed. R. Evid. 609(d).

We therefore conclude that the challenged ruling was not improper. We question, however, whether the government was well advised to press the objection. In view of the other testimony, the additional evidence could hardly have had a significant effect on the jury's assessment of Caicedo's credibility, but the exclusion of the evidence provided defendants with a serious issue for appeal.

We have considered appellants' other contentions and find them to be without merit. The admission of an incriminatory remark made by Ciro to Caicedo shortly after their arrest was proper because Caicedo was not acting as a government agent at the time. See *United States v. Calder,* 641 F.2d 76, 78-79 (2d Cir.), *cert. denied,* 451 U.S. 912 (1981). Ciro's claim that the government "unreasonably and needlessly relied on extensive hearsay evidence" in presenting its case to the grand jury is groundless. See *United States v. Dyman,* 739 F.2d 762, 767 (2d Cir. 1984). Although the district court declined to give the requested "hesitate to act" formulation on reasonable doubt, the court's charge, read in its entirety, fairly conveyed to the jury the substance of reasonable doubt. Similarly, the district court did not abuse its discretion in denying Ciro's motion for severance. See *United States v. Siegal,* 717 F.2d 9, 22 (2d Cir. 1983). Sloan argues that the district court erred in permitting the government to introduce the small quantity of cocaine discovered in her possession at the time of her arrest. The evidence was properly admitted to rebut the impression defense counsel apparently tried

to create, in cross-examining Detective Annarella, the undercover buyer, that Sloan might not have known that her conversation with Annarella was about cocaine. See *United States v. Levy*, 731 F.2d 997, 1002 (2d Cir. 1984). Finally, Sloan assigns error to the admission of her address book, which served to link her with Ciro and thus the conspiracy. We agree with the district court's determination that the book, found in Sloan's pocketbook, was lawfully seized incident to arrest. See *United States v. Barlin*, 686 F.2d 81, 87 (2d Cir. 1982) ("lady's handbag is the most likely place for a woman to conceal a weapon").

Affirmed.

RELEVANT CONSTITUTIONAL PROVISION AND RULE OF EVIDENCE

Amendment VI—Jury Trial for Crimes, and Procedural Rights

> . "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Rule 609. Impeachment by Evidence of Conviction of Crime

"(a) General rule

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

Relevant Constitutional Provision and Rule of Evidence

(b) Time limit

Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation

Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

Relevant Constitutional Provision and Rule of Evidence

(d) Juvenile adjudications

Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal

The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible."